Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for Decision

Jacques Anderson,

complainant,

and

IMTT-Québec Inc.,

respondent.

Board File: 27575-C
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September 26, 2011

The Canada Industrial Relations Board (the Board) was composed of Mr. Claude Roy, Vice-Chairperson, and Messrs. André Lecavalier and Norman Rivard, Members. A case management teleconference took place on September 18, 2009, and hearings were held in Québec, Quebec, from January 20 to 22, from April 28 to 30, and on June 2 and 3, 2010.

Appearances

Mr. Marius Ménard, for Mr. Jacques Anderson;

Mr. Christian R. Drolet, for IMTT-Québec Inc.

These reasons for decision were written by Mr. Claude Roy, Vice-Chairperson.

I–Nature of the Complaint

[1] On June 18, 2009, Mr. Jacques Anderson (the complainant) filed a complaint in which he alleged violation of sections 133 and 147 of the *Canada Labour Code (Part II Occupational Health and Safety)* (the *Code*) by IMTT-Québec Inc. (the respondent or IMTT). He stated that he had been suspended on April 1, 2009, and dismissed on April 2, 2009, for having provided information regarding a dangerous situation at IMTT's worksite in Québec to the various appropriate authorities. The complainant is seeking rescission of this disciplinary action, reinstatement, and payment of lost wages and all employment-related benefits. He is also seeking $5,000 in moral damages.

[2] During the eight days of hearings, the complainant called seven witnesses and the employer called five. The complainant explained the facts and circumstances surrounding his suspension and dismissal and called employees and an independent witness to testify in support of his allegations. The respondent, for its part, set out the reasons behind the disciplinary action against the complainant by means of witness testimony.

II–Background and Facts

[3] The complainant, a professional engineer, had been working at IMTT since October 1, 2007. The respondent is a multinational company specializing in the storage and handling of chemical and petroleum products. It operates in Québec, where its largest bulk storage terminal in Canada serves North America.

[4] The complainant was hired as a construction and maintenance manager. In November 2007, he was given the position of technical support manager following the departure of Mr. Pierre Pelletier, who would later return to work for the employer. In that new role, he was responsible for the ISO 9000 program, the emergency response plan, and energy and computer-based automation projects. Engineer Claude Dion was hired as a maintenance manager to replace the complainant. In February 2008, the assistant manager in charge of health and safety quit his job and was replaced by Mr. Frédéric Perron, a unionized technician.

[5] On June 16, 2008, Mr. Michel Lord was hired as the terminal manager, replacing Mr. Jacques Huot, who became manager of construction and major projects, a position he held until his departure in January 2009. In June 2008, the complainant was assigned additional responsibilities related to environment and health and safety, while responsibility for computer-based automation was shifted to Mr. Claude Dion.

[6] In January 2009, following the departure of Mr. Jacques Huot, Mr. Pierre Pelletier returned to work for the respondent in the position of maintenance manager, replacing Mr. Claude Dion, who took over the position of support manager and was given responsibility for construction and major projects. In addition, responsibility for environment was shifted from the complainant to Mr. Pelletier. The complainant was subsequently suspended on April 1, 2009, and dismissed on April 2, 2009.

[7] This was the situation as it existed following reassignment of certain responsibilities to management positions within the company between the time the complainant was hired and the time he was dismissed.

[8] In his testimony, the complainant stated that he performed his work very conscientiously, but was watched so closely and subjected to such diligence on the part of his fellow managers that a very unhealthy work climate developed within the company. According to Mr. Lord, he noted this problem immediately upon joining the company in June 2008 and then watched the situation between the complainant and Mr. Claude Dion deteriorate to the point that, by November 2008, he felt as though he were running a kindergarten. Mr. Richard Fisette, manager of the respondent's U.S. company located in Bayonne, New Jersey, informed Mr. Lord of a problem regarding the complainant, but as Mr. Fisette himself stated at the hearing, he had wanted Mr. Lord to form his own opinion of Mr. Anderson.

[9] The respondent holds a coordination meeting every morning at 8:30 a.m., to discuss and plan operations on the storage site, both in terms of day-to-day work and construction and renovation

work, so that each of the managers is aware of what is going on that day. The respondent also holds a meeting with all the managers every Monday at 10 a.m. for weekly and monthly follow-ups on operations.

[10] In his testimony, the complainant explained that he had wanted to point out fellow managers' shortcomings in the area of health and safety on the company site, and this had led to highly acrimonious interpersonal relations among members of management. He stated that his whistle-blowing had come after multiple errors, omissions and acts of negligence on the part of managers that could have jeopardized the safety of all workers at the terminal.

[11] The first event referred to by the complainant pertained to a fire on December 19, 2007, while a contractor was doing some welding work on a fuel line. The line was supposed to have been emptied and locked, but Operations performed a fuel transfer while the welding work was being done. As a result, one employee was injured and there was some damage to the facilities as well as environmental damage. This event was what first triggered the complainant's criticism of the manager in charge of issuing work permits and the manager of operations. It led to the scheduling of the daily coordination meetings and the review of work procedure.

[12] The second event occurred on November 14, 2008. A heating cable that had been left on caused the seals on a line to burst, resulting in a major fuel spill. The complainant blamed Mr. Jacques Huot for the oversight and faulted the manager, Mr. Lord for interfering with the samples and having the excavated area filled in without reporting the environmental contamination. On December 24, 2008, the complainant sent the ministère du Développement durable, de l'Environnement et des Parcs an environmental emergency report in this regard.

[13] A third event took place on November 20, 2008. A fuel spill occurred as a result of welding work done by a contractor on a fuel line that should have been empty but was not. The complainant noticed that the work permit prepared by Mr. Jacques Huot was flawed. The latter left IMTT in early 2009.

[14] A fourth event occurred around March 17, 2009, when a contractor, Montage d'acier International (MDI), was installing a liner and new floor in tank Number 1. Considering the need for the work to be done in an enclosed space and given the height of the structure, the complainant decided that a job safety analysis (JSA) should be conducted by IMTT, as project manager. Some very reproachful emails were exchanged between the complainant and Messrs. Michel Lord and Claude Dion regarding the determination of the project manager and worksite responsibility. The complainant drafted a report in which he held Mr. Dion responsible and sent it all the way to the American authorities.

[15] The emails exchanged between the complainant and his fellow managers on March 24 and 26, 2009, concerning an inspection to be conducted of the worksite in question by the *Commission de la santé et de la sécurité du travail* (CSST) shows the existence of animosity and a very strained work climate among the managers.

[16] The final event in this matter related to the installation of a light standard on the storage site. On March 12, 2009, IMTT awarded a contract to a company by the name of Patrick Latulippe Inc. (Latulippe), which was represented by Mr. Louis Latulippe, for the installation of an 80-foot-high light standard near tank Number 36. The work was carried out in the days that followed.

[17] On March 26, 2009, the complainant, along with union representatives, conducted a monthly health and safety committee inspection of a section of the storage site. Because he was concerned about safety issues surrounding the installation of the light standard, he sent an email to Mr. Claude Dion at around 3:18 p.m., asking him whether there were sealed plans and engineering calculations for the new light standard, as he was concerned about its wind resistance.

[18] On Friday, March 27, 2009, at 10:34 a.m., Mr. Richard Fisette emailed Messrs. Rick Courtney and Run Rushton in senior management, as well as terminal manager Michel Lord, to inform them of the decision to dismiss the complainant when the time was appropriate. He alluded to the extreme difficulty the complainant had in working with the other managers and the constant criticism he aimed at them and at Mr. Lord. He pointed out that the complainant met with him every time he was

in Québec to complain about his fellow managers and presented each situation to his advantage. He referred to the poor performance appraisal that Mr. Lord had given the complainant and mentioned in the email that he had instructed Mr. Lord to find someone else to act as the health and safety representative and, as soon as that was done, the complainant would be dismissed. According to Mr. Fisette, the complainant had only one way of seeing things and felt that he was right all the time while everyone else was wrong.

[19] The same day, having not received a response from Mr. Dion, the complainant approached Latulippe to get more information. He contacted the manufacturer of the light standard as well as one of the company's competitors to obtain installation plans. According to the complainant, ground compaction tests were required. He discussed the safety issue surrounding the installation and Mr. Claude Dion's responsibility with Mr. Claude Lamontagne, director of operations, Mr. Marc Dulude, vice-president of marketing, and Mr. Mike Kelly, union president, and informed them that he was planning to file a complaint against Mr. Dion with the *Ordre des ingénieurs du Québec*.

[20] On Monday, March 30, 2009, at 7:28 a.m., Mr. Lord sent the complainant an email, with a copy to all of the managers concerned, to inform him that Latulippe would provide IMTT with written confirmation that the light standard had been installed in accordance with the manufacturer's standards, which the company claimed it had even surpassed. A decision was made not to require plans and engineering calculations in the matter. In Mr. Lord's view, the matter was closed.

[21] At the coordination meeting held at 8:30 that same morning, the complainant informed those present of his concerns about the light standard, despite Mr. Lord's email. As they were leaving the meeting, Mr. Lord and the complainant had a heated exchange that even drew the attention of the employees in attendance.

[22] The complainant returned to his office and proceeded to write a long email to Mr. Richard Fisette in the United States, condemning the situation regarding the potential danger posed by the light standard in terms of its wind resistance and its placement between two tanks. He mentioned that he had done some calculations, as he had worked as an exhaust stack draftsman for three years. He

informed him that he had checked with the *Ordre des ingénieurs du Québec* and that this type of installation required plans certified by an engineer. Finally, he reported Mr. Lord's attitude toward him and told him of the altercation in the hallway that had been heard by all the employees present.

[23] The complainant discussed the situation with Mr. Mike Kelly, union president, and the latter called Ms. Rioux, the health and safety officer at Human Resources and Skills Development Canada. He passed on the information that he had been given by the complainant regarding the danger posed by the light standard. Mr. Kelly testified that Ms. Rioux had informed him that employees could refuse work if the respondent did not correct the situation. Ms. Rioux called the complainant to verify Mr. Kelly's information. The complainant never called her. She did not take any further action in the matter.

[24] The complainant then took the initiative to call Mr. Michel Petit, the harbourmaster at the Port of Québec, which was the owner of the site on which the tanks were located. He wanted to inform him of the danger posed by the light standard. Following that telephone call, he called the *Ordre des ingénieurs du Québec*.

[25] Given that the complainant was busy in his office writing a long email to Mr. Fisette and making calls to report the situation, he failed to attend the weekly management meeting at 10 a.m. The managers discussed the matter of the light standard with Mr. Lord and, because they did not want to take any risks, they decided to immediately call in an outside engineering consulting firm, GCM Consultants (GCM), to look into the matter.

[26] Just as that decision was made, two employees knocked on the door of the office where the weekly meeting was being held. Mr. Pierre Pelletier, manager in charge of maintenance and environment, answered. They informed him that the employees would be refusing to work near the light standard. Mr. Pelletier told them of the decision to bring in consultants. An order was immediately issued to secure the perimeter of the light standard, and the employees went about their work without carrying through on their threat to refuse work. Mr. Pelletier even held a discussion with the union president immediately afterwards to inform him that the consulting firm was being called in.

[27] That same day, March 30, 2009, at 4:20 p.m., the complainant emailed a formal complaint against his colleague, Mr. Claude Dion, to the *Ordre des ingénieurs du Québec*, alleging that Mr. Dion had breached his duty as an engineer on three occasions. He referred first to the installation of the light standard without any plans. He then mentioned the replacement of the floor in tank Number 1 and Mr. Dion's failure to first perform wind resistance calculations for the structure, which had been weakened by side cuts. Finally, he criticized Mr. Dion's failure to advise the CSST of the opening of a worksite that posed a risk and his failure to provide a prevention program.

[28] At 7:30 p.m., the complainant forwarded to the union president a complete copy of the email that he had sent to Mr. Fisette at 9:42 a.m. that same day, as well as a complete copy of the complaint against Mr. Dion that he had sent to the *Ordre des ingénieurs du Québec* at 4:20 p.m.

[29] It should be noted that the copies were forwarded from the complainant's personal computer. In fact, on Friday, March 27, the complainant, who was "starting to feel the heat," had transferred all of the emails from his work computer to his personal computer. He testified that he had done this because he had wanted to have as much information as possible.

[30] Mr. Claude Dion stated that the complaint filed with his professional body had greatly affected him and had tainted his reputation as an engineer. In addition, the fact that a copy of the complaint had been emailed to the union president had made him vulnerable in his relations with the employees, subsequently straining such relations seriously.

[31] The evidence shows that this was not the first time that the complainant had passed on information emanating from management to the union president in this manner. On February 4, 2009, the complainant was given a performance appraisal by Mr. Lord. On February 12, 2009, the complainant complained to Mr. Fisette about the appraisal, stating that Mr. Lord was not acting in good faith in his regard. That same day, Mr. Lord emailed Mr. Fisette to explain his position and that of the complainant in regard to the appraisal. He even brought up the matter of replacing the complainant. When the complainant received no news in response to his email of February 12, 2009,

he tried again on March 16, 2009, sending Mr. Fisette another long email at 2:46 p.m. At 5:07 p.m., he forwarded a copy of all the emails to the union president. He had done a similar thing on November 20, 2008, sending Mr. Frédéric Perron, the unionized health and safety technician, a complete copy of an email he had sent to Mr. Lord, in which he had alleged that errors had been made by Mr. Jacques Huot.

[32] In the evening of March 30, 2009, the complainant called Mr. Louis Latulippe, representative of the company that had installed the light standard. He asked whether he had plans for the installation work. Mr. Latulippe answered in the affirmative and, the next day, sent him the manufacturer's plans for the light standard. During the telephone conversation, the complainant informed Mr. Latulippe that he had filed a complaint against his colleague, Mr. Claude Dion, and also against Mr. Latulippe and the Latulippe company with the *Ordre des ingénieurs du Québec*, but stated that it was not Mr. Latulippe that he was targeting, but rather Mr. Dion. On February 2, 2010, the *Ordre des ingénieurs du Québec* issued two notices of violation, one in Mr. Latulippe's name and one in the company's name, for a total in each case of $1,885, including legal costs. The proceedings in the matter had not yet taken place at the time of Mr. Latulippe's testimony.

[33] On April 1, 2009, the consulting firm, GCM, informed IMTT that there was no immediate danger in terms of lack of stability of the light standard, but that additional checks were needed to assess long-term stability and extreme cases. The consultants were of the view that it was safe to remove the safety perimeter while they completed their checks. On May 8, 2009, however, the consultants stated that the light standard's stability should be improved by installing a reinforced concrete "collar" partially embedded in the ground around the post.

[34] In the evening of Tuesday, March 31, 2009, Mr. Lord received a telephone call from Mr. Claude Dion, who informed him that Mr. Louis Latulippe had just warned him that the complainant had filed a complaint against him with the *Ordre des ingénieurs du Québec*. Mr. Lord was shaken to find out that a professional at IMTT could file a complaint against another member of management at the same company with the professional body governing them and to realize the harm that could be caused, both to Mr. Dion and to the respondent. On the morning of April 1, 2009, Mr. Lord

consulted with IMTT's lawyer and, with Mr. Richard Fisette's consent, decided to suspend the complainant indefinitely while he completed the investigation in his regard. He faulted him for his attitude, his work performance and the latest developments in the matter of the light standard. The complainant was issued a warning to stay away from IMTT premises and refrain from entering into contact with any of the staff.

[35] As soon as the complainant left, his computer was checked and it was found that he had sent the union the emails previously mentioned. As soon as the analysis was completed, the complainant's remote access to the computer was taken away.

[36] On April 2, 2009, the complainant was sent a notice of dismissal by registered mail. The notice gave the reasons for the dismissal, which are set out below:

> **Subject: Termination of employment**
>
> Dear Sir:
>
> This letter is further to your suspension for investigation purposes on April 1, 2009.
>
> As stated in our letter of April 1, 2009, we have been very dissatisfied with your attitude and your work performance over the last several months.
>
> Further, upon investigation, we find that you were disloyal to the company, the undersigned and a colleague. Your communications with the port authorities and the *Ordre des ingénieurs du Québec* on March 30 and 31, 2009, were clearly aimed at discrediting IMTT-Québec Inc. management and Mr. Claude Dion. The fact that you forwarded a copy of the complaint that you filed with the *Ordre des ingénieurs* to the union president clearly shows this intent. In addition, those communications were profoundly harmful to the reputations of both the company and Mr. Dion. Rather than acting cooperatively and constructively in seeking internal consensus, you decided to lead a crusade that was nothing but destructive and malicious. Furthermore, although we do not fault you for discussing your feelings with senior management, it was totally unacceptable for you to send a blind copy of your email to the union president, given the highly alarmist statements therein.
>
> Under the circumstances, given the evidence gathered, it is clear that there has been a permanent breakdown of the relationship of trust. Accordingly, we wish to inform you that we are terminating your employment effective today.
>
> Your record of employment and any moneys that may be owing to you in salary and vacation pay will be sent to you in the coming days.

> Please be advised that the undersigned, Mr. Claude Dion and IMTT expressly reserve the right to bring actions in damages for any prejudice that your actions may cause them.
>
> Michel Lord
> Terminal Manager
>
> (translation)

[37] On June 18, 2009, the complainant filed his complaint with the Board, alleging that the respondent had violated sections 133 and 147 of the *Code* and stating the following:

> 1) My employer took action against me that violated section 147 of the *Canada Labour Code* by suspending me on April 1, 2009;
>
> 2) My employer dismissed me on April 2, 2009, for having provided information to the various appropriate authorities regarding a dangerous situation and a dangerous object;
>
> 3) After trying in vain to resolve the matter internally, I met with the health and safety committee, which informed me in writing that the actions that had been taken against me were illegal.
>
> (translation)

[38] These are the facts in this matter, in which the Board must determine the complaint against IMTT filed by Mr. Anderson, who alleges violation of Part II of the *Code*, respecting occupational health and safety.

III–Positions of the Parties

A–The Complainant

[39] In his complaint and in the statement of the facts filed in support of that complaint on June 25, 2009, the complainant states that the respondent violated section 147 of the *Code*, which sets out different circumstances under which an employee is protected from disciplinary action. He submits that he provided information to a person engaged in the performance of duties under Part II of the *Code* regarding conditions of work affecting his health or safety or the health and safety of his co-workers, as provided for under section 147(*b*). He alleges that he complied with section 126(1)(*c*) of the *Code*, which imposes on employees certain obligations relating to occupational health and safety, the following in particular:

126.(1) While at work, every employee shall

...

(*c*) take all reasonable and necessary precautions to ensure the health and safety of the employee, the other employees and any person likely to be affected by the employee's acts or omissions.

[40] In his arguments, the complainant alleges a violation of section 147(*b*) and (*c*) of the *Code*. However, in the plan for arguments submitted at the hearing, he refers to section 147(*a*). The Board accordingly assumes that the complainant is citing section 147 generally, in relation to providing information regarding a dangerous situation, participating in an inquiry provided for under Part II of the *Code*, and acting in accordance with the health and safety provisions set out therein or seeking to have them enforced.

[41] The complainant submits that he reported dangerous situations and breaches of safety rules by colleagues in his role as a person in charge and a member of the health and safety committee at the respondent's place of employment.

[42] He submits that any criticisms by the respondent in his regard were "swept under the rug" on March 26, 2009, following a meeting with Messrs. Fisette and Lord on March 19, 2009, at which it had been decided to try to restore harmony, going so far as wanting to go for dinner and attend a hockey game together, according to emails exchanged on March 20, 2009. The complainant submits that on March 24, 2009, there was nothing to indicate that there was a possibility that he would be dismissed.

[43] According to the complainant, the event relating to the light standard was the result of a health and safety committee inspection on March 26, 2009, and therefore of the exercise of a right provided for under Part II of the *Code*. The complainant submits that he reported a situation in which there was reasonable apprehension of a potential danger and that the expert report by the GCM consultants confirmed such potential danger in extreme cases of high winds. He argues that he was facing danger as that term is defined in section 122(1) of the *Code*, that is, an "existing or potential hazard or condition or ... activity."

[44] The complainant submits that the respondent violated section 425.1(1)(*a*) and (*b*) of the *Criminal Code*, RSC 1985, c C-46 (the *Criminal Code*), a provision enacted in 2004 that prohibits employers or persons acting on behalf of employers from taking disciplinary action against an employee who provides information to a person whose duties include the enforcement of a federal or provincial law. He alleges that he provided information regarding a dangerous situation and that he is protected under the *Criminal Code*. The provision in question reads as follows:

> 425.1(1) No employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so,
>
> (*a*) with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or
>
> (*b*) with the intent to retaliate against the employee because the employee has provided information referred to in paragraph (*a*) to a person whose duties include the enforcement of federal or provincial law.
>
> (2) Any one who contravenes subsection (1) is guilty of
>
> (*a*) an indictable offence and liable to imprisonment for a term not exceeding five years; or
>
> (*b*) an offence punishable on summary conviction.

[45] The complainant also states that he acted in accordance with the *Code of ethics of engineers*, RRQ 1981, c I-9, r 3, adopted under the *Engineers Act*, RSQ, c I-9. He acted in compliance with section 2.03 of the *Code of ethics of engineers*, which provides as follows:

> 2.03. Whenever an engineer considers that certain works are a danger to public safety, he must notify the Ordre des ingénieurs du Québec or the persons responsible for such work.

[46] He states that he had a duty to notify the syndic of the Order, in accordance with section 4.01.01(*g*), which states the following:

> 4.01.01. In addition to those referred to in sections 57 and 58 of the *Professional Code* (R.S.Q., c. C-26), the following acts are derogatory to the dignity of the profession:
>
> ...
>
> (*g*) not notifying the syndic without delay if he believes that an engineer infringes this Regulation.

[47] With regard to the information provided to the harbourmaster at the Port of Québec, the complainant submits that he acted in accordance with the *Public Ports and Public Port Facilities Regulations*, SOR/2001-154, adopted under the *Canada Marine Act*, SC 1998, c 10, and refers to section 14(*a*) and (*h*) thereof, which reads as follows:

> 14. Unless otherwise authorized under these *Regulations*, no person shall, by act or omission, do anything or permit anything to be done in a public port or at a public port facility that has or is likely to have any of the following results:
>
> (*a*) to jeopardize the safety or health of persons in the public port or at the public port facility;
>
> ...
>
> (*h*) to adversely affect sediment, soil, air or water quality.

[48] The complainant adds that he acted in accordance with section 25(*c*) of the *Public Ports and Public Port Facilities Regulations*:

> 25. Every person who by act or omission causes a dangerous situation in a public port or at a public port facility must
>
> ...
>
> (*c*) notify a port official without delay as to the nature of the dangerous situation and the precautions that have been taken and their location.

[49] He argues that he is protected under the *Criminal Code* for providing information to the Port of Québec authorities and to the *Ordre des ingénieurs du Québec* even if, in the latter case, the complaint was against an employee of the respondent given the wording of section 425.1(1) of the *Criminal Code*.

[50] The complainant states that the respondent cannot dismiss him on the basis of actions on his part that were legal.

[51] With regard to the complainant forwarding the respondent's emails to the union president, the complainant explains that Mr. Mike Kelly developed a special channel of communication with

Mr. Richard Fisette and the practice is part of the company culture. According to the complainant, the respondent cannot fault him for it and the subject communications bear no consequences. He argues that he has the right to express his views pursuant to the *Canadian Charter of Rights and Freedoms* (Part I of *The Constitution Act, 1982*) (U.K.) and the *Charter of Human Rights and Freedoms*, RSQ, c C-12.

[52] The complainant concludes by stating that if the respondent relied on illegal grounds to dismiss him, then his dismissal was illegal. Further, he submits that the Board cannot take into account any grounds cited by the respondent that date back to before March 20, 2009, as the parties achieved a sort of reconciliation at that time.

B–The Respondent

[53] The respondent submits that the Board is not the *forum conveniens* for ruling on the application of the provisions relied on by the complainant for his whistle-blowing. The provisions of the *Criminal Code*, the *Canada Marine Act* and related *Public Ports and Public Port Facilities Regulations*, and the *Code of ethics of engineers* of Quebec do not vest the Board with any jurisdiction to rule on compliance in their regard and in no way justify or excuse behaviour deemed unacceptable by the respondent.

[54] The respondent argues that the complainant had for several months been attempting to discredit the terminal manager and his colleagues. Given the complainant's behaviour and negative attitude, the respondent decided on March 27, 2009, to terminate his employment. In any event, the complainant's last performance appraisal, dated February 4, 2009, had already raised that possibility in that it recommended that the employee not be retained.

[55] According to the respondent, it is not the fact that the complainant may have reported a potentially dangerous situation involving the light standard that led to his dismissal, but rather his fierce determination, following the inspection of March 26, 2009, to disparage his colleague, his immediate supervisor and, as a result, his employer.

[56] There was a permanent breakdown of the relationship of trust when a check of the complainant's computer revealed that he had forwarded emails from management to the union.

[57] In the respondent's view, the complainant acted out of frustration and, in its opinion, such behaviour within a company is unacceptable. Usually, a complaint filed with a professional body remains confidential until such time as the professional is found guilty, since the professional's career could be compromised even if the complaint is dismissed. Yet the complainant forwarded the complaint against Mr. Dion to the union, which also left Mr. Dion in a vulnerable position in his relations with the employees. By acting the way he did, the complainant caused real harm to the respondent, which employs an engineer who is the subject of a complaint filed with his professional body. Furthermore, the respondent pointed out in its arguments that the complainant had drafted that complaint during working hours, which amounts to a theft of time.

[58] According to the respondent, by filing a complaint with the *Ordre des ingénieurs du Québec* against Latulippe and the company's representative, Mr. Louis Latulippe, the complainant caused serious harm to the company's business relations.

[59] The respondent argues that there was no refusal to work by any employee, including the complainant, and therefore sections 128 and 129 do not apply. Section 133(6) of the *Code* relating to the reversal of the burden of proof also cannot apply, which means that the complainant must prove, on a balance of probabilities, that the respondent violated section 147 of the *Code*—a burden that he did not succeed in discharging.

[60] Finally, the respondent submits that the Board lacks jurisdiction to rule on the nature and degree of disciplinary action taken, that is, whether it was warranted or excessive. The jurisdiction of the Board is limited to determining whether the action was taken as a result of the complainant's exercising a right provided for under Part II of the *Code*.

IV–Analysis and Decision

A–Applicable Law

[61] The term "danger" is defined as follows in section 122(1) of the *Code*:

> 122.(1) In this Part,
>
> "danger" means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system.

[62] Section 133(1) of the *Code* reads as follows:

> 133.(1) An employee, or a person designated by the employee for the purpose, who alleges that an employer has taken action against the employee in contravention of section 147 may, subject to subsection (3), make a complaint in writing to the Board of the alleged contravention.

[63] Section 133(3) of the *Code* states that, where a complaint by an employee is in respect of the exercise of a right under section 128 (refusal to work), certain conditions must be met:

> 133.(3) A complaint in respect of the exercise of a right under section 128 or 129 may not be made under this section unless the employee has complied with subsection 128(6) or a health and safety officer has been notified under subsection 128(13), as the case may be, in relation to the matter that is the subject-matter of the complaint.

[64] Section 128(6) of the *Code* states the following in this regard:

> 128.(6) An employee who refuses to use or operate a machine or thing, work in a place or perform an activity under subsection (1), or who is prevented from acting in accordance with that subsection by subsection (4), shall report the circumstances of the matter to the employer without delay.

[65] Section 128(1) of the *Code* reads as follows:

> 128.(1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that

(*a*) the use or operation of the machine or thing constitutes a danger to the employee or to another employee;

(*b*) a condition exists in the place that constitutes a danger to the employee; or

(*c*) the performance of the activity constitutes a danger to the employee or to another employee.

[66] With regard to the burden of proof, section 133(6) of the *Code* provides as follows:

133.(6) A complaint made under this section in respect of the exercise of a right under section 128 or 129 is itself evidence that the contravention actually occurred and, if a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party.

[67] Any employee who exercises a right to refuse work must report the circumstances of the matter to the employer without delay pursuant to section 128(6) of the *Code*. Once this has been done, the employee may exercise recourse under section 128 of the *Code* or the provisions of a collective agreement pursuant to section 128(7), and the employee's choice of recourse is irrevocable unless the employer agrees otherwise.

[68] Section 128(8) of the *Code* sets out the next steps:

128.(8) If the employer agrees that a danger exists, the employer shall take immediate action to protect employees from the danger. The employer shall inform the work place committee or the health and safety representative of the matter and the action taken to resolve it.

[69] If the employee continues to refuse work, section 128(9) comes into operation:

128.(9) If the matter is not resolved under subsection (8), the employee may, if otherwise entitled to under this section, continue the refusal and the employee shall without delay report the circumstances of the matter to the employer and to the work place committee or the health and safety representative.

[70] On being notified that an employee continues to refuse work, the health and safety officer must investigate the matter, in accordance with section 129(1) of the *Code*.

[71] The *Code* prohibits an employer from taking disciplinary actions against employees for exercising their rights under Part II of the *Code*. Section 147 of the *Code* provides the following in this regard:

147. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee:

(*a*) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;

(*b*) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or;

(*c*) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

B–Decision

[72] The Board must begin by ruling on the burden of proof issue. As set out in section 133(6) of the *Code*, a complaint made in respect of the exercise of rights by employees under section 128 or 129 is itself evidence that the contravention actually occurred. The respondent accordingly has the burden of demonstrating the opposite and proving that there was no reason to refuse work.

[73] In the matter before it, the Board notes that there was no refusal to work on the part of the complainant that would trigger the operation of section 128 of the *Code*. The complainant may not rely on a refusal to work by unionized employees for his complaint, since there was never any such refusal. Further, the procedures to be followed subsequent to such a refusal as set out in section 128 of the *Code* were never undertaken.

[74] In response to the information received from the complainant on the morning of March 30, 2009, the union president representing the respondent's employees called Ms. Rioux, the health and safety officer at Human Resources and Skills Development Canada, who informed him of the rights provided for under the *Code*. According to Mr. Kelly's testimony, Ms. Rioux told him that employees had to notify the respondent of the dangerous situation without delay and, if the respondent did nothing, they could refuse work. Two employees did go to the respondent's offices during the management meeting that generally starts at 10 a.m. and informed Mr. Pelletier of a potentially dangerous situation relating to the light standard. Other than what they had been told by the complainant, the employees in question could not know how the light standard could be

dangerous. The complainant never called Ms. Rioux. She called him to verify the information provided by the union president.

[75] The respondent had by then already decided to call in a consulting firm to check the light standard's conformity to standard and an order was immediately given to secure the perimeter of the light standard. The employees accordingly carried on with their duties and never refused work. The respondent was in compliance with section 128(8) of the *Code*, having immediately taken proper action to protect the employees.

[76] In view of this, the burden of proof is on the complainant, who must show that the respondent suspended and dismissed him in violation of section 147 of the *Code* because he had exercised the rights provided for therein.

[77] The Board has limited power in the area of health and safety. In *Jacques Ouimet*, 2002 CIRB 171, the Board stated the following in this regard:

> [56] The Board's role is not to determine if the level of discipline was fair, nor even whether the employer had just cause for taking whatever disciplinary action, as an arbitrator would do in a grievance procedure, according to the collective agreement. Its role is to be satisfied that the employer's action is not tainted with retaliation against the complainant for his role as co-chairperson of the committee and other related activities. It is therefore not up to the Board to decide if the disciplinary action taken was justified or excessive (see *Patrick R. Ridge* (1992), 88 di 20 (CLRB no. 934)). An employer may take disciplinary action against an employee for a good reason, a debatable reason or for no reason at all, as long as there is no violation of the provisions of the *Code* (see Claude H. Foisy et al., *Canada Labour Relations Board Policies and Procedures* (Toronto: Butterworths, 1986), at page 247).
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> [57] Neither the seriousness of the consequences of the complainant's poor quality of work, according to the employer, nor the fact that theoretically other people could have had access to the valve on the main air reservoir duct are in themselves determining factors for the Board.

[78] In *Air Canada*, 2007 CIRB 394, the Board indicated the following concerning its jurisdiction:

> [60] The only jurisdiction the Board has under Part II of the *Code* is to hear complaints alleging that an employer has punished an employee for exercising the rights spelled out in section 147 of the *Code*. Section 147 provides as follows:
>
> "147. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period that the employee would, but for the exercise of the employee's rights under this Part, have worked, or take

> any disciplinary action against or threaten to take any such action against an employee because the employee
>
> (*a*) has testified or is about to testify in a proceeding taken or an inquiry held under this Part;
>
> (*b*) has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or
>
> (*c*) has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part."
>
> ...
>
> [63] A review of sections 133, 134, 147 and 156 of Part II of the *Code* indicates that the only jurisdiction the Board has regarding health and safety matters is to adjudicate complaints alleging that an employer has punished an employee for having exercised certain rights.

[79] The complainant referred to section 147 of the *Code* and it was the Board's understanding that he was referring to one paragraph or another of that section.

[80] In his complaint, the complainant alleged that he had been suspended on April 1, 2009, and dismissed on April 2, 2009, for providing information regarding a dangerous situation to the various appropriate authorities. He argued that he was protected under section 425.1(1) of the *Criminal Code*, which prohibits employers from taking disciplinary action against an employee who provides information to a person whose duties include the enforcement of a federal or provincial law. The complainant submits that he is protected by the *Criminal Code* and that the respondent had no right to take disciplinary action against him for reporting his colleague to the *Ordre des ingénieurs du Québec* and informing the harbourmaster at the Port of Québec that the light standard was not safe.

[81] However, no complaint was ever filed against the respondent alleging violation of that section of the *Criminal Code*. Only a criminal court has the jurisdiction to determine whether or not a violation of that section occurred and, if so, impose sanctions on the employer. The *Code* does not give the Board any jurisdiction to enforce that section of the *Criminal Code*.

[82] Further, should any violation of the *Code of ethics of engineers* of Quebec have occurred, the syndic of that professional body would be the one responsible for dealing with a complaint before the disciplinary committee of the *Ordre des ingénieurs du Québec*. In the instant matter, no complaint alleging violation of the *Code of ethics of engineers* of Quebec was ever filed against the

respondent. The complaints filed were against a manager of the respondent and against Latulippe and its representative.

[83] With respect to the information the complainant provided to the harbourmaster at the Port of Québec on March 30, 2009, regarding the danger posed by the light standard, the complainant himself failed to comply with section 25(*c*) of the *Public Ports and Public Port Facilities Regulations* in that he failed to inform the harbourmaster of the precautions taken by the respondent involving the safety perimeter and its calling in of a consulting firm. In any event, the Board has no jurisdiction to police the application of the regulation in question or of the *Canada Marine Act*.

[84] The Board's jurisdiction is limited to determining whether or not the complainant's employment was terminated because he exercised a right under section 147. It is not required to rule on the nature and severity of the disciplinary action. The evidence as previously summarized clearly shows that the complainant was not suspended or dismissed because he exercised a right under section 147(*a*), (*b*) or (*c*).

[85] The balance of evidence suggests that the complainant was suspended and dismissed not because he reported the potential danger posed by the light standard, but because of his behaviour prior to this event and his actions following it.

[86] As early as February 4, 2009, when the complainant's appraisal was done, the recommendation was not to retain the complainant. On March 27, 2009, Mr. Fisette informed Mr. Lord that a decision had been made to dismiss the complainant when the time was appropriate, that is, once someone else had been found to assume responsibility for health and safety.

[87] Clearly, the respondent did not have to wait to find a replacement before dismissing the complainant. The reason for the dismissal was not that the complainant had sought compliance with or enforcement of the health and safety provisions of the *Code*, but merely that there had been a breakdown of the relationship of trust as a result of the complainant's clear lack of loyalty and the disrepute he had caused the company.

[88] The complainant acted disloyally toward the respondent when, on November 20, 2008, he forwarded an email regarding errors made by a colleague to Mr. Frédéric Perron, a health and safety technician and when, on March 16 and 30, 2009, he forwarded to the union president an email he had sent Mr. Fisette in which he questioned the competence of the terminal manager, as well as a copy of the complaint he had filed against Mr. Dion with the *Ordre des ingénieurs du Québec*.

[89] In his fierce determination to discredit the terminal manager and his colleagues, the complainant wound up discrediting the respondent. Further, he failed to provide the harbourmaster at the Port of Québec with complete information by leaving out the safety measures that had been introduced and the action that had been taken to correct the situation. The complaints he filed with the *Ordre des ingénieurs du Québec* against his colleague and against Latulippe and its representative, Mr. Louis Latulippe, demonstrate a blind determination that brought discredit to the respondent both internally and in its business relations.

[90] The complainant attempted to show the Board that the respondent or its managers had neglected the safety of workers during events or work in 2007, 2008 and early 2009. However, no evidence was produced to show that the health and safety committee had intervened in accordance with the *Code* or that there was any follow-up on the events. Moreover, all of the events to which he referred date back more than 90 days and so are outside the time limit for filing a complaint under section 133(2) of the *Code*. The complainant sought to show the shortcomings of the managers with whom he had been working, but none of the information provided constitutes grounds for his complaint.

[91] The Board lacks jurisdiction to rule on whether the disciplinary action was warranted or not. The Board can do no more than observe that the complainant failed to demonstrate on a balance of probabilities that the respondent had suspended or dismissed him because he had participated in an inquiry under Part II of the *Code*, had provided health or safety information to a person engaged in the performance of duties under Part II of the *Code*, or had acted in accordance with the provisions of Part II of the *Code*.

[92] The information he sent to the union president (email to Mr. Fisette and complaint filed with the *Ordre des ingénieurs du Québec*) is in no way information related to health and safety provided to a person engaged in the performance of duties under Part II of the *Code*.

V–Conclusion

[93] For all the reasons stated above, the complaint is dismissed.

[94] This is a unanimous decision of the Board.

Certified Translation
Communications

Claude Roy
Vice-Chairperson

André Lecavalier
Member

Norman Rivard
Member